Supreme Court, U.S.
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No. 02-

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN KIFER, OFFICER, CITY OF COLUMBUS DIVISION OF POLICE,

Petitioner,

v.

KATHRYN (BECKY) FRIEBIS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court reviewing the enforceability of a release-dismissal agreement that bars a § 1983 claim is required to determine enforceability prior to conducting a trial on the merits of the § 1983 claim, as the Third, Seventh and Ninth Circuits have decided, or is it permissible for a court to determine enforceability after a trial on the merits of the § 1983 claim as the Sixth Circuit has held?

2. When does a federal court's invalidation of a release-dismissal agreement based solely on "public interest" constitute an impermissible infringement upon a state court's administration of its criminal justice system?

PARTIES TO THE PROCEEDINGS

Petitioner is John Kifer, a police officer with the City of Columbus, Ohio, Division of Police. Respondent is Kathryn (Becky) Friebis.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 0

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 7

I. The Questions Presented Have Divided The Lower Courts 9

A. The Third, Seventh and Ninth Circuits Have Decided That Pursuant To *Rumery* A Federal Court Must Evaluate The Enforceability Of A Release-Dismissal Agreement That Bars a Plaintiff's § 1983 Claim Prior To Conducting A Trial On The Merits Of The Plaintiff's § 1983 Claim. 9

B. The Sixth Circuit Allows A Federal Court To Conduct A Trial On The Merits Of A § 1983 Claim That Includes A Determination As To (1) Whether The Release-Dismissal Agreement Was Voluntarily Entered Into And (2) Without Prosecutorial Misconduct And Further Allows That The Jury Verdict On The § 1983 Claim Constitutes A Public Interest Basis For Refusing To Enforce The Release-Dismissal Agreement. 12

C. The Fifth And Eighth Circuits Have Refused To Consider the Jury Verdict On The Merits Of The § 1983 Claim In Assessing The Public Interest Factor Of The *Rumery* Analysis. 13

II. The Questions Are Recurring In Nature And Significant To Prosecutors, Cities, and State Courts Throughout The Country. 15

III. The Sixth Circuit Erred In Permitting A Trial On The Merits Of The Plaintiff's § 1983 Claim Prior To Evaluating The Enforceability Of The Release-Dismissal Agreement And Further Erred In Holding That The Jury's Verdict In Favor Of Plaintiff On Her § 1983 Claim Was A Public Interest That Rendered The Release Unenforceable. 17

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Berry v. Peterson, 887 F.2d 635 (5th Cir. 1989)..... 13

Blackledge v. Allison, 431 U.S. 63 (1977) 16

Brady v. United States, 397 U.S. 742 (1970))..... 19

Cain v. Darby Borough, 7 F.3d 377 (3rd Cir. 1993)(*cert. denied*, 510 U.S. 1195 (1994)) 11

Coughlen v. Coots, 5 F.3d 970 (6th Cir. 1993) 7, 13

Dye v. Wargo, 253 F.3d 296 (7th Cir. 2001)..... 3, 9

Evans v. Jeff D., 475 U.S. 717 (1986)..... 20

Hughes v. Rowe, 449 U.S. 5 (1980) 17

Lynch v. City of Alhambra, 880 F.2d 1122 (9th Cir. 1989) 10

Newton v. Rumery, 480 U.S. 386 (1987)..... 2, 7

United States v. Mezzanatto, 513 U.S. 196 (1995)..... 19

United States v. Ruiz, 122 S. Ct. 2450 (2002)..... 15, 19

United States v. Standiford, 148 F.3d 864 (7th Cir. 1998). 20

Woods v. Rhodes, 994 F.2d 494 (8th Cir. 1993) 14

Statutes

28 U.S.C. § 1254(1)..... 1

42 U.S.C. § 1983 ..... 1, 9

Rules

Rule 23(e)..... 20

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-3) is unreported. The district court's opinion denying summary judgment is unreported (Pet. App. A-46). The district court's post-verdict decision denying enforcement of the release was oral. (Pet. App. A-19).

JURISDICTION

The court of appeals entered judgment on August 29, 2002 (Pet. App. A-3). Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

This case squarely presents recurring federal questions stemming from the Court's decision in *Newton v. Rumery*, 480 U.S. 386 (1987), that have not been, but should be, resolved by the Court. In *Rumery*, the Court granted the town's petition for a writ of certiorari "[b]ecause the case raise[d] a question important to the administration of criminal justice." *Id.* at 392. That question—the enforceability of release-dismissal agreements—is no less important, and perhaps more so, than it was in 1987.

In *Rumery*, the Court held that release-dismissal agreements, whereby prosecutors dismiss criminal charges in exchange for a waiver of the criminal defendant's right to sue, are not *per se* unenforceable. *Id.* at 397. The Court held that in determining whether such releases are valid, federal courts must engage in a case-by-case analysis, and that a release is enforceable where (1) the release was entered into voluntarily, (2) there was no prosecutorial misconduct, and (3) relevant public interests would not be adversely affected by enforcement of the release. *Id.* at 398.

However, the appropriate procedure for evaluating the enforceability of release-dismissal agreements under the *Rumery* criteria has divided the lower courts. This split among the circuits is most apparent in the divergent positions of the Seventh and Sixth Circuits. The Seventh Circuit has held that a court should determine the enforceability of a release-dismissal agreement prior to conducting a trial on the merits of a § 1983 claim because holding a trial on the merits of the § 1983 claim constitutes a *per se* invalidation of the agreement. Deferring the determination of the enforceability of the agreement until after a trial on the merits of the plaintiff's § 1983 claim is to say, in effect, that no release can ever avert a hearing on the

merits of the plaintiff's claim (along with the associated expense) even if the state actors prevailed in the end. *Dye v. Wargo*, 253 F.3d 296 (7th Cir. 2001).

On the other hand, the Sixth Circuit allows federal courts to conduct a trial simultaneously on the merits of a § 1983 claim and a determination as to enforceability of a release-dismissal agreement. As explained below, the lower court conducted a trial on the merits of the plaintiffs' claim that included evidence as to whether a judicially-supervised and approved release agreement executed by plaintiffs in prior criminal proceedings was voluntary and as to the prosecutor's motivation for entering the agreement. The jury determined the agreement was voluntary, that probable cause existed for the arrest of both plaintiffs and that the defendant police officer had used unreasonable force against one plaintiff. (Pet. App. A-24). The lower court subsequently ruled that there was no evidence of prosecutorial misconduct in the execution of the release. (Pet. App. A-22). Nevertheless, the lower court refused to give any effect to the release-dismissal agreement based solely on the public interest in upholding the jury finding of unreasonable force and entered the single verdict against the officer. (Pet. App. A-22). The Sixth Circuit affirmed the lower court. (Pet. App. A-8).

The Sixth Circuit's approach, basing enforceability upon an "after-the fact" verdict, amounts to a *per se* invalidation of the release agreement in direct contravention of *Rumery*. Not only does this approach conflict with those circuits that have decided that enforcement of a release should be determined prior to a trial on the merits of a § 1983 action, it also conflicts with two circuit courts, the Fifth and Eighth, which have issued thoughtful decisions upholding enforcement of releases even where favorable verdicts were rendered to § 1983 plaintiffs. These circuits

have determined that the public interest should be evaluated at the time the release is entered into by the § 1983 plaintiff and not later, thereby rejecting the type of revisionism permitted by the Sixth Circuit.

This case illustrates the need for the Court to provide post-*Rumery* direction to the lower courts to achieve the uniform application of the *Rumery* criteria and to prevent the amorphous concept of "public interest," and an undetermined procedure for its evaluation, from serving as the basis for federal courts to effect a *per se* invalidation of release-dismissal agreements. And, as explained below, to prevent impermissible intrusion into the state court's administration of its criminal justice system, particularly in cases where releases are concluded under judicial supervision and as part of the criminal plea bargaining process. All these considerations are compelling federal questions that have not been, but should be, resolved by the Court. The writ should be granted.

1. Like many other state courts and prosecutors' offices throughout the United States, the Franklin County Municipal Court and City of Columbus Prosecutor's Division permit individual criminal defendants to voluntarily enter into release-dismissal agreements, thereby waiving all civil claims, including § 1983 claims, in exchange for reduction or dismissal of misdemeanor criminal charges. These releases are often suggested by criminal defense attorneys as an incentive for prosecutors to reduce meritorious criminal charges. Each City prosecutor has the discretion to accept or reject the release-dismissal offer as part of any plea agreement. If accepted, the Franklin County Municipal Court has a written release-dismissal agreement form available for the parties' convenience. The court supervises and approves the written release-dismissal agreement along with all other terms of

the plea bargain. By resolving cases through the plea bargaining process, with its attendant judicial oversight, a court system like the Franklin County Municipal Court is able to expeditiously administer justice in approximately 50,000 misdemeanor cases each year.

2. In September 1997, Columbus Police Officer John Kifer arrested Robert Friebis and Kathryn (Becky) Friebis at the scene of an accident. Both were taken to jail and charged with obstruction of official business, misdemeanors of the second degree. Robert Friebis was also charged with resisting the arrest of Becky Friebis, also a second-degree misdemeanor. They were released from jail shortly after their arrests. Both retained Mr. Kenneth Spiert, an experienced criminal defense attorney, to represent them on the criminal charges. Both cases were assigned to Franklin County Municipal Court Judge Teresa Liston.

3. The criminal charges remained pending until February 1998, when Assistant City Prosecutor Robert Levering agreed, shortly before the jury trial of the matter, to accept a release agreement offered by defense attorney Spiert on behalf of both Friebises, and offer to plea to minor misdemeanor charges. (Pet. App. A-41; A-67). According to Prosecutor Levering, while the plea offered by the defense was low, he felt it was sufficient punishment to the defendants who had let their emotions get the better of them, resulting in their arrests. Prosecutor Levering stated he was prepared to try the cases if a plea arrangement was not reached, as there were several eyewitnesses at the scene who supported the police officer's version of the arrest. Furthermore, he was not aware of any evidence of misconduct on the part of Officer Kifer, nor did Officer Kifer ever request that a release of liability be part of the plea negotiations.

Prosecutor Levering obtained a one-page release form from Judge Liston's bailiff, and the parties went before Judge Liston and made a record of the plea bargain and releases (Pet. App. A-69). Judge Liston questioned both Friebises as to their agreement and understanding of the release. The releases were signed not only by the Friebises, but also Judge Liston, Prosecutor Levering and defense attorney Spiert. (Pet. App. A-78; A-80). By their signatures, these officers of the court attested that Robert Friebis and Becky Friebis were "fully advised and informed as to the legal aspects and circumstances of signing this Release-Dismissal Agreement and has voluntarily, knowingly and deliberately executed this release." The terms of the release prohibited either defendant from suing the City of Columbus, Officer Kifer, and the paramedics at the scene.

4. Six months later, Robert Friebis and Becky Friebis filed suit under § 1983 in state court against the City of Columbus and Officer Kifer. They alleged that Officer Kifer falsely arrested them and used unreasonable force. They also asserted various state tort claims. Defendants removed the matter to the Federal District Court for the Southern District of Ohio. The defendants filed a motion for summary judgment relying on the release-dismissal agreements as an affirmative defense. The District Court denied defendants' motion, holding that factual issues existed as to whether the agreement was voluntarily entered into and without prosecutorial misconduct. (Pet. App. A-46).

5. The City of Columbus was forced to retain private special counsel (at significant expense) to represent the defendants at trial because City prosecutors would be key witnesses and, therefore, the City Attorney's office could not longer represent the defendants. A jury trial was conducted from September 11, 2000 to September 20, 2000.

The jury found that both Becky Friebis and Robert Friebis voluntarily signed the release-dismissal agreements. (Pet. App. A-24; A-26). The jury found in favor of Officer Kifer on all claims of the Friebises with the sole exception of a verdict in favor of Becky Friebis for $5,000 based upon her claim of unreasonable force.

A post-trial hearing was held and the district court held as matter of law that no prosecutorial misconduct had occurred during the prosecution and resolution of the criminal charges. (Pet. App. A-22). The district court, however, refused to enforce the terms of the release-dismissal agreements based solely upon the jury's single verdict against Officer Kifer. The district court found as a matter of law that it was in the public interest to let the verdict stand and entered the jury's verdict upon the record.

6. Officer Kifer appealed to the Sixth Circuit. On August 29, 2002, the court of appeals affirmed in a 2-1 decision, stating that "[i]t would be inconsistent with *Rumery* and *Coughlen* [*v. Coots*, 5 F.3d 970 (6th Cir. 1993)] if we did not take [the jury's] conclusion into consideration when determining whether the public interest is served by enforcement of the release-dismissal agreement. Given the jury's verdict, we affirm the district court's decision not to enforce the release-dismissal agreement." (Pet. App. A–8).

REASONS FOR GRANTING THE WRIT

It has been fifteen years since the Court issued its decision in *Newton v. Rumery*, 480 U.S. 386 (1987), and important questions left unanswered by that plurality decision have resulted in divergent practices by the lower courts in the application of the *Rumery* criteria, particularly as to how and at what point in the litigation process the

validity of the release-dismissal agreements is to be determined.

The case presented by this writ illustrates the need for the Court to address these issues to prevent the basic holding of *Rumery* from being undermined to the point that such agreements can no longer be used effectively by state prosecutors. The Third, Seventh and Ninth Circuits have properly recognized that conducting a trial on the merits of a plaintiff's § 1983 claim prior to determining the enforceability of a release amounts to a *de facto* invalidation of the release-dismissal agreement regardless of the outcome of the trial. However, the Sixth Circuit has sanctioned allowing cases to proceed to jury verdict prior to the release-dismissal enforcement determination being made by the trial court. The facts of this case provide a good example of how the latter approach can result in improper intrusion by federal courts into matters of prosecutorial discretion and administration of criminal justice in state courts. With recurrence of this departure from the *Rumery* decision being inevitable as precedent continues to be established, this writ should be granted.

I. The Questions Presented Have Divided The Lower Courts

A. The Third, Seventh and Ninth Circuits Have Decided That Pursuant To *Rumery* A Federal Court Must Evaluate The Enforceability Of A Release-Dismissal Agreement That Bars a Plaintiff's § 1983 Claim Prior To Conducting A Trial On The Merits Of The Plaintiff's § 1983 Claim.

The Seventh Circuit's decision in *Dye v. Wargo,* 253 F.3d 296 (7th Cir. 2001), typifies the position of those courts that have held it is not appropriate for a federal court to allow a trial on the merits of a plaintiff's § 1983 claim without first determining whether a release-dismissal agreement, which would bar the plaintiff from proceeding with the § 1983 claim, is enforceable based on the *Rumery* criteria. In *Dye*, the lower court had granted summary judgment to the defendants, the city of Elkhart and a police officer, finding that the plaintiff's claim of excessive force under the Fourth Amendment and 42 U.S.C. § 1983 was barred by the release-dismissal agreement the plaintiff had entered in order to resolve criminal charges. On appeal, the Seventh Circuit assessed the enforceability of the release-dismissal agreement, applying the *Rumery* criteria. The Court held that the release-dismissal agreement (1) was voluntarily entered into, (2) there was no prosecutorial misconduct, and (3) the public interest in enforcement was not outweighed by a federal public policy harmed by enforcement of the agreement. The Seventh Circuit explicitly rejected the plaintiff's argument that there was a "public policy interest in preventing the police from getting

off scot free for shooting helpless suspects." *Id.* at 301. The Court reasoned that in order to determine whether the police officer had used excessive force it would be necessary to hold a trial, which would not only constitute a *per se* invalidation of the release-dismissal agreement but would also contravene the public interest in enforcing the agreement.

> Yet to hold such a trial would be to say in effect that *no* release of liability under § 1983 can be enforced, for a release would never avert a hearing on the merits of the plaintiff's claim and all of the associated expense, even if the state actors prevailed in the end. That would make it harder (if not impossible) for parties to settle their differences without litigation. . . . It is difficult to see how making releases unenforceable could help other persons in Dye's position who might very much want to resolve their disputes, only to be rebuffed by municipalities who would be unwilling to enter agreements that their adversaries could choose to discard.

Id. (emphasis in original).

The Ninth Circuit in *Lynch v. City of Alhambra*, 880 F.2d 1122 (9th Cir. 1989), also recognized that the inquiry the district court must perform in evaluating the enforceability of a release-dismissal agreement that would bar a plaintiff from asserting a § 1983 claim undermines, to some extent, the very purpose of the release-dismissal agreement signed by the parties." *Lynch* at 1129, fn. 10). The Ninth Circuit reversed the lower court's granting of summary judgment to the defendants on the plaintiff's § 1983 claim, however, holding that the lower court had departed from the *Rumery* analysis by failing to evaluate the

public interest factor as distinct from prosecutorial misconduct. On appeal, Lynch argued that because the crime for which he had been charged involved a police officer and no third parties and because his § 1983 claim alleged police misconduct, his release-dismissal agreement was against the public interest. The Ninth Circuit rejected "the categorical approach urged by Lynch because such an approach is inconsistent with the policies outlined by the Supreme Court in *Rumery* . . . . In addition, such an approach would undercut some of the interests furthered by the use of release-dismissal agreements." *Id.* at 1127. The Ninth Circuit remanded the case to the district court for a determination limited to whether enforcement of the agreement would violate public policy. *Id.* at 1128.

The Third Circuit in *Cain v. Darby Borough*, 7 F.3d 377 (3rd Cir. 1993)(*cert. denied*, 510 U.S. 1195 (1994)), has also weighed in on the appropriate analysis of the *Rumery* public interest factor. "The standard for determining whether a release meets the public interest requirement is an objective one, based upon the facts known to the prosecutor when the agreement was reached. Additionally, the public interest reason proffered by the prosecutor must be the prosecutor's actual reason for seeking the release." *Id.* at 381. "[T]he issue is not what the prosecutor might or could have thought; it is what actually motivated him or her in seeking a particular release." *Id.* The Third Circuit made the preliminary determination that Cain's release was unenforceable before remanding the case for a trial on the merits of her § 1983 claim. *Id.* at 383.

B. The Sixth Circuit Allows A Federal Court To Conduct A Trial On The Merits Of A § 1983 Claim That Includes A Determination As To (1) Whether The Release-Dismissal Agreement Was Voluntarily Entered Into And (2) Without Prosecutorial Misconduct And Further Allows That The Jury Verdict On The § 1983 Claim Constitutes A Public Interest Basis For Refusing To Enforce The Release-Dismissal Agreement.

On the other side of the ledger, the Sixth Circuit, in this case, affirmed the lower court's procedure of conducting a combined trial on the merits of the plaintiff's § 1983 claims with a trial presenting evidence as to the enforceability of the release-dismissal agreement. The lower court heard testimony on the merits of the plaintiff's claims in order to elicit evidence as to the voluntariness of the release-dismissal agreement and the absence of prosecutorial misconduct. The issue of voluntariness was then submitted to the jury. The jury concluded that both Becky Friebis and Robert Friebis had been lawfully arrest and voluntarily entered into the release-dismissal agreement, yet returned a verdict in favor of Becky Friebis on her § 1983 claim of unreasonable force. Based on the evidence at trial, the lower court held that there was no prosecutorial misconduct as a matter of law. The lower court then held that the public interest factor of *Rumery* would be served by giving effect to the jury's verdict in favor of Becky Friebis in the amount of $5,000.

On appeal, the Sixth Circuit affirmed the trial court's rationale that the public interest prong of *Rumery* would be served by "allowing the jury verdict to stand." According to the Sixth Circuit, "[i]t would be inconsistent with *Rumery* and *Coughlen* [*v. Coots*, 5 F.3d 970 (6th Cir. 1993)] if we did not take that conclusion into consideration when determining whether the public interest is served by enforcement of the release-dismissal agreement. Given the jury's verdict, we affirm the district court's decision not to enforce the release-dismissal agreement." (Pet. App. A-8).

C. The Fifth And Eighth Circuits Have Refused To Consider the Jury Verdict On The Merits Of The § 1983 Claim In Assessing The Public Interest Factor Of The *Rumery* Analysis.

The Fifth Circuit in *Berry v. Peterson*, 887 F.2d 635 (5th Cir. 1989), reviewed an award of $200,000 to a plaintiff on his § 1983 claim following a jury trial. According to the Fifth Circuit, the only issue necessary to reach on appeal was the enforceability of the covenant not to sue that the plaintiff had entered into which barred his § 1983 claim. Despite the jury's finding that the release-dismissal was unenforceable and the sizeable verdict for the plaintiff on all counts, the Fifth Circuit concluded: "the agreement was not 'involuntary' as is contemplated by *Rumery*, that there was no evidence of prosecutorial misconduct, and that the release was not adverse to the public interest because the release was "an effective, rational bargain with the County" that benefited both Berry and the County. *Id.* at 641. The Fifth Circuit further added:

> The various felony charges pending against Jack [Berry] were not inconsequential, but, unlike the deal struck in *Rumery*, the County did not dismiss those charges but recommended probation, a sensible result when Jack's youth was taken into consideration. The County saved its taxpayers' money by not having to go to trial on any of those charges. In short, the County's handling of this matter was not skewed unfairly toward the interest of its officials while disadvantaging Berry or the public.

Id. at 641.

Furthermore, in *Woods v. Rhodes*, 994 F.2d 494 (8th Cir. 1993), the Eighth Circuit reversed the lower court's denial of summary judgment to defendants, the city of Sioux City and a police officer, who claimed that the plaintiff's § 1983 excessive force and state law claims were barred by a valid, binding release of civil claims as quid pro quo for dropping criminal charges. After denying summary judgment, the lower court sent the case to the jury for a finding on the merits of the plaintiff's claims as well as a finding on whether the agreement was voluntarily entered into. The jury found that Woods did not voluntarily waive her right to sue, and awarded her $200,000 in compensatory damages and $1 in punitive damages. The Eighth Circuit reversed the lower court's denial of summary judgment, holding, "Even assuming it is a fact question, reasonable minds could not dispute that the release in this case was executed voluntarily." *Id.* at 500. The Eighth Circuit similarly concluded as a matter of law that there was no prosecutorial overreaching and the agreement did not violate public policy, noting the courts normally must defer to

prosecutorial discretion. *Id.* at 501. The court implicitly refused to consider the jury's verdict in evaluating the public interest, stating that "[Woods] attempts now to revoke her agreement to the release because she perceives the disadvantages now outweigh the advantages. Woods is not entitled to such revisionism. Having made her bargain, she is now held to it." *Id.* at 502.

II. The Questions Are Recurring In Nature And Significant To Prosecutors, Cities, and State Courts Throughout The Country.

In rejecting the argument that release-dismissal agreements are inherently coercive, the majority in *Rumery* noted the analogy, albeit incomplete, between plea bargains and release-dismissal agreements. *Id.* at 393 n.3. Among the benefits received by the State in plea agreements is "promptly imposed punishment without the expenditure of prosecutorial resources. *Id.* (citation omitted). In addressing the issue of the potential for prosecutorial misconduct, the plurality further noted that prosecutors "must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge." *Id.* at 396 (footnote omitted). Justice O'Connor's concurrence observed that "[s]paring the local community the expense of litigation associated with some minor crimes for which there is little or no public interest in prosecution may be a legitimate objective of a release-dismissal agreement." *Id.* at 399-400 (citation omitted).

Fifteen years later, similar concerns over resource management in the criminal justice system were behind the Court's decision that the Constitution does not require pre-guilty plea disclosure of impeachment information. *United States v. Ruiz*, 122 S. Ct. 2450, 2455 (2002). Such

disclosure "could require the [Federal] Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages," or, alternatively, to abandonment of the heavy reliance on that process altogether. *Id.* at 2457.

Plea bargaining is equally important to local communities involved in the administration of the state criminal justice process. And while releases are not a standard part of that process, they are a legitimate and valuable component of that process by facilitating resolution of some cases. If state prosecutors are unable to depend on the federal courts to enforce releases--even when the prosecutor has acted appropriately in all respects and the state court judge has properly considered and approved the agreement of which the release is a material term--then this tool loses its utility to the prosecutor and, more importantly, to the plea bargaining process. To allow what are in effect *per se* invalidations to continue unabated would be inconsistent not only with *Rumery*, but also with this Court's decisions in cases like *Ruiz* that have recognized the legitimacy, if not the necessity, of prosecutors' use of plea bargaining and its associated tools. *See, e.g., Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("The guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system... [The] advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality").

Moreover, if federal courts are permitted to defer the release validity determination until after a trial and verdict, any resources that were saved by local communities as a result of the plea bargain in the criminal case will have been consumed by the cost of the civil case. Particularly given that prevailing defendants in § 1983 actions can rarely

recover attorney's fees, a post-trial validity determination by the trial court does not allow for the recovery of the expended resources, regardless of the outcome of that determination. See *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (defendant's recovery of attorney's fees under 42 U.S.C. § 1988 requires that the plaintiff's action be "meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself sufficient...").

In this case, the expenditure of resources was compounded by the need to bring in both the prosecutor and the judge to testify at trial. The necessity of the prosecutor testifying at trial in turn created a conflict that required the City to expend even more resources to retain outside counsel. Clearly, the public interest in the prudent allocation of limited public resources was disserved, rather than served, by the post-trial *Rumery* determination process that was upheld by the Sixth Circuit in this case. The significance of this issue to local governments, particularly in times of increasingly scarce public resources, independently supports the writ.

III. The Sixth Circuit Erred In Permitting A Trial On The Merits Of The Plaintiff's § 1983 Claim Prior To Evaluating The Enforceability Of The Release-Dismissal Agreement And Further Erred In Holding That The Jury's Verdict In Favor Of Plaintiff On Her § 1983 Claim Was A Public Interest That Rendered The Release Unenforceable.

In *Rumery*, the Court found that, as a matter of federal common law, a release-dismissal agreement will operate to bar a section 1983 claim unless 'the interest in

[the agreement's] enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery* at 392, noting the *Restatement (Second) of Contracts* § 178 (1)(1981). In the comments to the Restatement, the commentators stated: "Whether a promise is enforceable on grounds of public policy is determined as of the time that the promise is made and is not ordinarily affected by a subsequent change of circumstances, whether of fact or law." *Restatement (Second) of Contracts* § 178, comment d (1981).

Thus, it is incumbent upon the federal court to determine whether the § 1983 claim is barred by the agreement prior to commencing a trial on the merits of the § 1983 claim, and such determination perforce must be made in light of the circumstances as of the time that the agreement was entered. In particular, the balancing of public interest must be made in light of the circumstances that motivated the release.

The release in this case was offered by respondent's defense attorney as incentive for the prosecutor to reduce the criminal charges to minor misdemeanors resulting in no jail time and imposition of only a small fine. The prosecutor had felt that the Friebises, who had no prior records, had been sufficiently punished for their offenses by arrest, jail and prosecution, but was willing and prepared to try the case as he felt the charges were meritorious. By resolving the matter through plea bargaining, the government's resources were saved by avoiding a jury trial and the Friebises avoided the risk of conviction on more serious charges. The written release agreements were approved by the criminal defendants, their counsel, the prosecutor and the judge presiding over the criminal cases.

The choice made by a criminal defendant to accept a plea agreement is made at the time he or she pleads guilty, and the validity of the plea is examined by the court at that time. "When a defendant pleads guilty he, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees. Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary' and the defendant must make related waivers 'knowingly, intelligently, [and] with sufficient awareness of the relevant circumstances and likely consequences.'" *United States v. Ruiz*, 122 S. Ct. at 2455 (citations omitted) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)); *see also*, *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution").

Under the approach sanctioned by the Sixth Circuit in this case, a state court judge could approve a plea agreement in which a criminal defendant voluntarily waived his or her fundamental right to a fair trial and other accompanying constitutional guarantees (which agreement may result in the judge depriving that defendant of his or her liberty), but yet the criminal defendant's release of all civil claims arising out of the same incident could be invalidated by a federal court solely on the basis of "public interest" and even though the release was contemporaneously approved by the state court judge. This anomalous situation is both illogical and contrary to established principles of Federal-State comity. In this case, the state court judge approved the release as a material part of the agreement between the parties to resolve all disputes related to the incident. If such releases are not *per se* invalid, as *Rumery* held, the state court's judgment as to the release not being contrary to public policy must be honored by a federal court.

Not only does this ruling allow a federal court to disregard the state court's finding by permitting the federal civil suit to proceed, but also it sanctions the federal court's unilateral alteration of the parties' agreement by adding a condition subsequent to that agreement. In this case, the condition added by the lower court allowed the release to be voided in the event of a verdict adverse to the officer. Given that perhaps the most material benefit to such a release is the avoidance of the cost and burden of litigation in the first place, this condition permitting the § 1983 case to proceed to verdict effectively nullifies that release. It would make no sense for the prosecutor to agree to such a condition as part of the plea agreement, and its imposition on the defendants by a federal judge does not make it any more acceptable. *Cf. Evans v. Jeff D.*, 475 U.S. 717, 726 (1986) ("Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed").

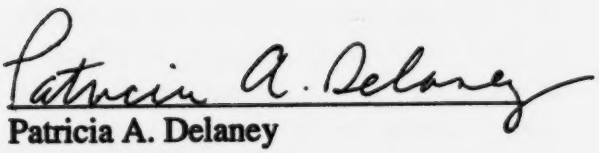
Assuming there has been no coercion or prosecutorial misconduct, a criminal defendant is free to reject any plea offer including a release agreement. However, once that criminal defendant accepts the agreement, he or she is not entitled to receive the benefit of the bargain while avoiding that which they voluntarily offered in consideration for that benefit. See *United States v. Standiford*, 148 F.3d 864 (7th Cir. 1998) (dismissing appeal from sentence after affirming decision to deny defendant's request to withdraw from plea agreement in which he had waived his right to appeal). In this case, the Sixth Circuit has approved the lower court's alteration of the agreement in such a way that totally nullified the

consideration received by the defendants, yet benefited the criminal defendant in all respects.

CONCLUSION

The petition should be granted for these compelling reasons.

Respectfully submitted,



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